IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, Petitioner	)	
	)	No: 0806028750
v.	)	
OGDEN BLAKE, Defendant	)	

Date Submitted: February 27, 2009
Date Decided: September 14, 2009

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FINAL ORDER AND OPINION ON DEFENDANT'S MOTION TO SUPPRESS

A hearing on Defendant's Motion to Suppress was held in this Court on February 5, 2009. After receipt of the evidence and testimony presented, the Court reserved decision and permitted the parties to submit closing arguments in writing. After careful consideration of the arguments, this is the Court's final order and opinion.

Facts

On June 20, 2008, Officer MacDonald and Krystopolski of the Delaware State Police were dispatched by RECOM at 11:42 p.m. to I-495 northbound in reference to a

disabled vehicle and/or motorist in distress that was called in by a passerby. The officers, traveling in two marked police vehicles, both arrived on or about 11:46 p.m. at the location of the vehicle. Officer MacDonald testified that he took the Terminal Avenue entryway onto I-495 northbound and located a 1994 Silver Nissan Pathfinder a few hundred yards further up the road. Officer Krystopolsk ined with the Pathfinder while Officer MacDonald drove another 300 yards farther up I-495 and approached the defendant walking away from the Pathfinder in a northerly direction on the shoulder of the road. The defendant as wearing a black t-shirt, dark jeans, and did not have a flashlight. Officer MacDonald testified that I-495 is a controlled access highway and no pedestrian traffic is allowed on any part of the roadway. The officer also testified that he found it odd that the defendant would be walking northbound since the nearest exit was only a few hundred yards to the south and the next northbound exit (i.e. the 12th Street) was approximately 1.5 miles away. Officer MacDonald further stated that I-495 had light to moderate traffic traveling at or around the average speed for that road, which in his experience he noted to be around 80 miles per hour. Officer MacDonald considered it a danger for the defendant to be walking on I-495 and offered to the give the defendant a ride in his patrol car.

Officer MacDonald's first contact with the defendant occurred when the defendant leaned into Officer MacDonald's vehicle to talk. Officer MacDonald noted that he had an initial sense that the defendant seemed disoriented but that he did not form an opinion as to the causation of the disorientation, and did not observe any impairment of the defendant at the time. Officer MacDonald testified that he had the following conversation with the defendant:

Officer: “Is everything OK?”

Defendant: “Yeah, that’s my truck, I just ran out of gas.”

Officer: “Where are you going?”

Defendant: “I’m just going to walk home and get some gas.”

Officer: “I’m going to give you a ride off the interstate, it’s not safe to walk at night.”

Officer MacDonald stated that his intent in allowing the defendant into his patrol car was to move the defendant off of I-495 for safety. He further stated that, in his experience, once an individual takes him up on his offer for a ride the individual usually then gives him a more specific instruction for a drop off point or requests a tow service, but in this case the defendant did not make a more specific request. Officer MacDonald testified that once the defendant had voluntarily entered into the back of the patrol car and all of the windows were rolled up he immediately detected a strong odor of alcohol. The smell persisted the whole time he drove the defendant to the 12th Street exit.

Subsequently, Officer MacDonald decided to conduct an investigation at the 12th Street exit to determine if the defendant had been walking drunk on the highway. The defendant adamantly denied any consumption of alcohol. Officer MacDonald decided that he wanted to administer a Portable Breath Test (P T) to determine if he was accurate in his assessment that the defendant was, at a minimum, intoxicated on the highway. Officer Krystopolski arrived in time to observe Officer MacDonald let the defendant out of the back of the patrol vehicle. The officers had been in communication over their radios and Officer Krystopolski had arrived to perform a DUI investigation given that the defendant appeared disoriented, had a strong odor of alcohol on his breath, and had

previously indicated that he had just left his vehicle The vehicle was positively identified as the defendant's based on the defendant's own admission, the fact that the vehicle was registered in the defendant's name, and the fact that the car keys were on the defendant's person were used to subsequently tow it.

Officer Krystopolski testified that the defendant stumbled out of the patrol vehicle. While outside, the defendant consented to take Officer Macdonald's PBT. Officer MacDonald indicated that the defendant "failed" the test. Officer MacDonald did not follow an observation period prior to administering the PBT. Officer Krystopolski then proceeded to conduct the DUI investigation.[1] Officer Krystopolski noted the following about the defendant: slurred and mumbled speech, watery and bloodshot eyes, and a strong odor of alcoholic beverage. Further, the defendant failed the three National Highway Traffic Safety Administration (NHTSA) tests administered to him. He exhibited six clues on the Horizontal Gaze Nystagmus (HGN) test, five on the walk-and-turn test, and two on the one-leg stand test. The officer testified to the statistic accuracy of each of these tests, including the 80% statistical accuracy of the combined HGN and walk-and-turn test failures. The defendant recanted his earlier statement to Officer MacDonald and initially told Officer Krystopolski that he had one beer, laughed, then said he had had two beers, and finally said he had had three beers. Upon completing her roadside investigation, Officer Krystopolski placed the defendant in handcuffs and arrested him for suspicion of DUI (21 Del. C. §4177(a)) and for walking intoxicated on the highway (21 Del. C. §4149).

[1] The State submitted into evidence Certificates of Proficiency for both Officer Krystopolski and Officer MacDonald, marked as State's Exhibit 1 and State's Exhibit 2, indicating that each officer has successfully completed the prescribed course for alcohol content determinations by the Delaware Department of Public Safety and the Division of State Police, and is licensed to perform the duties of an alcohol testing technician.

Analysis

Although a warrantless seizure is presumed unreasonable under the Fourth Amendment, this presumption may be rebutted by showing that a specific exception to the warrant requirement applies.[2] One exception recognized in Delaware is the non-criminal, non-investigative "community caretaker" or "public safety" doctrine. This doctrine stems from the recognition that, in addition to law enforcement, police officers have a duty to assist in emergency situations and aid those who are in physical danger. To require reasonable suspicion of criminal activity before police can investigate and render assistance in these situations would severely hamstring their ability to protect and serve the public.[3] As the Delaware Supreme Court noted,

> The community caretaker doctrine has three elements. First, if there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in apparent peril, distress or need of assistance, the police officer may stop and investigate for the purpose of assisting the person. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once, however, the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, the caretaking function is over and any further detention constitutes an unreasonable seizure unless the officer has a warrant, or some exception to the warrant requirement applies, such as a reasonable, articulable suspicion of criminal activity.[4]

Defendant asserts that the community caretaker doctrine does not apply here, because Officer MacDonald's did not take the defendant to a place of safety, but rather transported him to an industrial area off of 12th Street.

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[2] Williams v. State at 216
[3] Id.
[4] *Williams v. State*, 962 A.2d 210, 219 (Del. 2008)

The Court finds that the community caretaker doctrine did not, and need not, apply to the stop off of 12th Street. Upon first observing the defendant, Officer MacDonald observed that the defendant was in need of assistance and was in a position of potential danger. Defendant was walking alone, without a flashlight, along a major highway at night. Under the community caretaker doctrine, Officer MacDonald was permitted to stop and investigate for the purpose of aiding the defendant, and take the appropriate action of transporting the defendant off of the highway in his vehicle. Once Defendant was seated in the vehicle, Officer MacDonald noticed a strong odor of alcohol emanating from the defendant. This was sufficient to arouse a reasonable, articulable suspicion in Officer MacDonald that a crime had been committed. A police officer may detain an individual for a short period of time for investigatory purposes where the officer has a reasonable, articulable suspicion that the individual has committed or is about to commit a crime.[5] Therefore, Officer MacDonald was permitted to deviate from his course under the community caretaker doctrine and conduct an investigatory seizure of the defendant.

Defendant next argues that the field tests conducted by Officer Krystopolski and the PBT conducted by Officer MacDonald were not conducted consistent with NHTSA requirements and are therefore invalid. Specifically, defendant argues that the NHTSA standards require that the PBT be administered after field tests are administered, because the PBT is a confirmatory test. Therefore, defendant argues, the field tests administered here were tainted by the result of the failed PBT.

There is no requirement under Delaware law or under NHTSA standards that require the PBT to be administered only after field tests are administered. Furthermore,

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[5] *Terry v. Ohio*, 392 U.S. 1 (1968)

Defendant failed to point to any testimony or evidence suggesting that the results of the particular field tests here were tainted by the result of the PBT.

Defendant also asserts that the PBT result may not have been valid, because Officer Krystopolski did not conduct the required observation period before administering the PBT, and also testified during the suppression hearing that he did not know the last time the PBT was last calibrated. However, as this Court has noted,

> Failure of the PBT is admissible for probable cause purposes. In a trial where recognized testing devices like intoxilizers are employed, the absence of testimony about before and after calibrations, waiting periods, and similar considerations necessary to establish confidence in scientific results would be fatal. Probable cause evidence, however, is less restrictive than trial testimony. The PBT is limited to probable cause purposes and the expression of the finding, albeit in a conclusion, merely goes to weight. Essentially appellant contends probable cause determinations must rest on reliable evidence requiring a foundation that the PBT was properly working and not contaminated. But other facts indicate impaired driving by themselves, and they also corroborate and permit its consideration.[6]

Therefore, any question as to the PBT's proper function may only go to the weight placed on the test result, rather than its admissibility. Whether there was probable cause to arrest a defendant is determined under a totality of the circumstances test.[7] Here, the defendant emitted a strong odor of alcohol, admitted he had been drinking, and failed three field sobriety tests. Even if little reliance were placed on the PBT result, the Court finds that probable cause existed to arrest the defendant.

Finally, Defendant argues that the State has not made a showing that the blood alcohol testing in this case was performed within the requirements of 21 Del. C. §4177(a)(5). The Court finds that this issue is not yet ripe and therefore need not be

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[6] *Caggiano v. Shahan*, 1997 WL 1737110 at *2 (Del. Com. Pl. 1997)
[7] *Jackson v. State*, 2009 WL 2006879 at *7 (Del. Supr.)

addressed. No testimony as to blood alcohol testing has been presented, and this argument is properly reserved for the guilt phase of trial.

For the foregoing reasons, Defendant's Motion to Suppress is hereby DENIED.

SO ORDERED

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WILLIAM C. BRADLEY
JUDGE